United Nations CAT/C/CHE/CO/7

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Concluding observations on the seventh periodic report of Switzerland*

1. The Committee against Torture considered the seventh periodic report of Switzerland (CAT/C/CHE/7) at its 1336th and 1339th meetings, held on 3 and 4 August 2015 (see CAT/C/SR.1336 and 1339), and adopted the following concluding observations at its 1352nd meeting, held on 13 August 2015.

A. Introduction

2. The Committee expresses its appreciation to the State party for accepting the optional reporting procedure, as this allows for a more focused dialogue between the State party and the Committee.

3. The Committee welcomes the frank and constructive dialogue with the State party delegation and thanks the delegation for its detailed responses to the questions and concerns raised by Committee members.

B. Positive aspects

4. The Committee notes with satisfaction the ratification by the State party of the Convention on the Rights of Persons with Disabilities in 2014.

5. The Committee welcomes the legislative measures taken by the State party to give effect to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in particular:

(a) The adoption in 2010 of a Federal Act on coordination between the asylum procedure and the extradition procedure;

(b) The adoption of the Swiss Code of Criminal Procedure, which entered into force in 2011 and provides for, inter alia, the immediate assistance of a lawyer;

(c) The adoption in 2011 of a provision criminalizing female genital mutilation.

6. The Committee also welcomes the other efforts of the State party to give effect to the Convention, including:

* Adopted by the Committee at its fifty-fifth session (27 July-14 August 2015).

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(a) The adoption in 2012 of a national action plan against trafficking in human beings (2012-2014) and the organization in 2013 of the first national campaign to raise awareness of trafficking;

(b) The adoption in 2013 of a national programme to combat forced marriage (2013-2018);

(c) The adoption in 2013 of an agreement between the Court of Justice, the Criminal Court and the Public Prosecutor's Office, regulating non-custodial alternatives.

C. Principal subjects of concern and recommendations

Definition and criminalization of torture

7. The Committee remains concerned that the State party does not consider it necessary to define torture as a specific crime under ordinary law, despite the Committee's repeated recommendation in its previous concluding observations (see CAT/C/CR/34/CHE, paras. 4 (a) and 5 (a), and CAT/C/CHE/CO/6, para. 5). Although behaviours that could be characterized as acts of torture are punishable under various articles of the Criminal Code, in the Committee's view, the fact that there is no definition of torture as a specific criminal offence, covering all the elements of the definition in article 1 of the Convention, creates a legal vacuum that may open up the possibility of impunity (arts. 1 and 4).

The Committee reiterates the recommendation previously made to the State party that it make torture a criminal offence, in terms that fully reflect article 1 of the Convention, and ensure that penalties for torture are commensurate with the gravity of the crime. The Committee would like to draw the State party's attention to its general comment No. 2 (2007), on the application of article 2 by States parties, paragraph 11 of which underscores the preventive effect of having the crime of torture defined as an offence in its own right.

Fundamental legal safeguards

8. While applauding the introduction of a provision on the immediate assistance of a lawyer (see para. 5 (b) above), the Committee notes that this right applies only from the outset of custodial arrest (*arrestation provisoire*) for the investigaton of crimes or offences. The Committee remains concerned at the lack of an entitlement to the assistance of a lawyer as part of the process of arrest (*appréhension*). In practice, there have been reported cases in which persons deprived of their liberty were unable to inform a relative of their situation, were not examined by a doctor or were not informed of their rights from the outset of the deprivation of liberty (art. 2).

The Committee recommends that the State party take effective steps to ensure that all persons who are deprived of their liberty have the benefit, in practice and from the very outset of the deprivation of liberty, of all the fundamental legal safeguards, namely the right of access to a lawyer, the right to contact family members or other persons of their choice and the right to an independent medical examination by a doctor of their choice.

National human rights institution and national preventive mechanism

9. The Committee notes with satisfaction the information provided by the delegation confirming that the State party will make a final decision on the establishment of a permanent human rights institution at the end of 2015. In this respect, the Committee recalls the importance of establishing a national institution

fully in conformity with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles) as soon as possible, to strengthen the implementation of obligations under the Convention by the various cantons. The Committee also takes note of the information indicating that insufficient financial resources are allocated to the National Commission for the Prevention of Torture, which was established to serve as the national preventive mechanism under the Optional Protocol to the Convention (art. 2).

The Committee recommends that the State party expedite the process of establishing a national human rights institution with a mandate in accordance with the Paris Principles, and provide it with the necessary financial and human resources. The State party should also provide the National Commission for the Prevention of Torture with the resources it needs to effectively fulfil its mandate as the national preventive mechanism.

Police violence

10. The Committee is concerned at information received to the effect that alleged cases of excessive use of force and of racist behaviour by the police and immigration services are not systematically reported to the authorities, even where there is medical evidence of injury. It also notes with concern the reports indicating the lack of prompt and effective investigations, as noted by the European Court of Human Rights in the case of *Dembele v. Switzerland* (2013). In this regard, the Committee finds it regrettable that the State party has not yet established an independent body to investigate individual cases, despite the Committee's repeated recommendation in its previous concluding observations (see CAT/C/CR/34/CHE, para. 4 (g), and CAT/C/CHE/CO/6, para. 9). The Committee also finds it regrettable that the State party has not provided adequate statistical data at the national level concerning allegations of violence and ill-treatment by law enforcement officers. With regard to the data relating to the cantons of Geneva, Vaud and Zurich, it notes with concern that a large number of cases were discontinued and that, in the few cases that resulted in penalties being applied, these were only disciplinary sanctions (arts. 2, 12, 13 and 16).

The Committee urges the State party to:

(a) Create an independent mechanism empowered to receive complaints relating to violence or ill-treatment by law enforcement officers and to conduct timely, impartial and exhaustive inquiries into such complaints;

(b) Ensure that medical reports of injuries indicating ill-treatment are sent without delay to the independent mechanism responsible for carrying out a thorough examination;

(c) Try those suspected of acts of torture or ill-treatment and, if they are found guilty, sentence them to punishment commensurate with the gravity of their acts;

(d) Ensure that victims have access to effective remedies and reparation.

Violence against women

11. The Committee welcomes the awareness-raising and other legislative measures (see para. 5 (c) above) taken by the State party regarding violence against women. However, the Committee remains concerned about the high number of prosecutions for domestic violence that are dropped (70 per cent), in some cases because they are suspended by the competent authority with the tacit agreement of the victim. In this regard, the Committee welcomes the approval by the Federal Council of the proposal to amend the law to make a hearing of the victim mandatory before a case can be

closed. The Committee also notes with concern that, where convictions are handed down for domestic violence, the penalties incurred are light (art. 2).

The Committee recommends that the State party:

(a) Amend its legislation to ensure that, in cases that may give rise to discretionary suspension under article 55 (a) of the Criminal Code, the victim is consulted and gives explicit, free and informed consent before the Public Prosecutor's Office can suspend proceedings;

(b) Ensure that all other cases of violence against women are automatically subject to effective and impartial proceedings and that perpetrators are prosecuted and punished in accordance with the serious nature of their acts;

(c) Continue to sensitize and train the judiciary and law enforcement officials on all kinds of violence against women and on ex officio prosecution of cases;

(d) Continue its campaigns to raise public awareness, particularly among young people, in order to combat domestic violence and gender stereotyping.

12. While welcoming the amendment in July 2013 of article 50 of the Federal Foreign Nationals Act, the Committee is nevertheless concerned at information received to the effect that the threshold "level of violence" suffered and the evidentiary burden remain too high, which makes it impossible for foreigners who are victims of domestic violence to leave a violent spouse without losing their residence permit (arts. 2, 13, 14 and 16).

The Committee urges the State party to extend protection under article 50 of the Federal Foreign Nationals Act to foreigners who have been recognized as victims of domestic violence within the meaning of the Federal Act on Assistance to Crime Victims, without setting the threshold level of violence too high to allow protection to be granted.

Non-refoulement

13. The Committee notes the information provided by the State party indicating that an assessment of the risk of violation of the principle of non-refoulement is made in each case. However, the Committee is concerned at reports that the assessment does not take proper account of information concerning the situation in the country of origin. In this regard, the Committee notes with concern the allegations that two Tamils who were forcibly returned to Sri Lanka were subjected to torture, and notes the State party's undertaking to bring them back to Switzerland and to discontinue returns to Sri Lanka. Lastly, the Committee is concerned at reports to the effect that extradition is sometimes carried out only on the basis of diplomatic assurances provided by the country of origin and that, according to information received, those assurances do not appear to have been honoured in some cases (art. 3).

The State party should under no circumstances expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The Committee recalls that it has adopted the position that under no circumstances should a State party regard diplomatic assurances as being a safeguard against torture or ill-treatment when there are substantial grounds for believing that a person would be in danger of being subjected to torture upon his or her return. The State party should thoroughly consider the merits of each individual case, including the overall situation with regard to torture in the country of return. It should put in place effective post-return monitoring arrangements for use in the event of refoulement and ensure that returned persons receive protection, re-entry and

reparation in the event of torture or ill-treatment as a result of decisions on return or extradition, in accordance with article 14 of the Convention.

14. The Committee notes with concern that appeals against an expulsion decision do not have suspensive effect and that return may be immediately enforceable under articles 64 (d) and 68, paragraph 4, of the Federal Foreign Nationals Act. The Committee also finds it regrettable that the accelerated procedure for refusal of entry at the airport under article 65 of the Federal Foreign Nationals Act has not yet been amended to give an appeal suspensive effect and permit a thorough assessment of the risk of violations of the principle of non-refoulement (art. 3).

In the light of its previous concluding observations (see CAT/C/CHE/CO/6, paras. 13 and 14), the Committee urges the State party to amend its legislation in order to provide undocumented migrants with an effective judicial remedy with automatic suspensive effect against expulsion decisions under articles 64, 64 (d), 65 and 68 of the Federal Foreign Nationals Act. The State party should also ensure that the accelerated procedure under article 65 of the Federal Foreign Nationals Act is subject to a thorough assessment on a case-by-case basis of the risks of violations of the principle of non-refoulement.

15. While noting with satisfaction the draft amendment to the Asylum Act and the fact that free legal assistance is granted to asylum seekers in some appeal procedures, the Committee notes that, to date, free legal assistance has not been granted in initial hearings, in appeals under the Dublin procedure, in reconsideration or review procedures, or in the case of multiple applications (art. 3).

The Committee urges the State party to ensure that the revised Asylum Act guarantees asylum seekers free access to a qualified, independent lawyer in all initial proceedings and ordinary and extraordinary appeal proceedings.

Forced repatriation

16. The Committee welcomes the fact that, since July 2012, the National Commission for the Prevention of Torture has supervised forced repatriation by air, but notes that no provision is made for the Commission's oversight of forced repatriation by sea. The Committee also welcomes the fact that a medical support team is provided and that sedatives are no longer used as a means of constraint. However, the Committee remains concerned at the fact that inquiries into the case of Joseph Ndukaku Chiakwa, who died while being removed in 2010, are still going on after having been discontinued in 2012 and reopened in 2013 following an appeal by his relatives (arts. 12, 14 and 16).

The Committee urges the State party to continue guaranteeing the attendance of observers from the National Commission for the Prevention of Torture at all forcible removals of foreigners, including at removals by sea and on joint return flights coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, known as Frontex flights. The Committee encourages the State party to ensure that non-consensual administration of medication does not occur during repatriations and that the use of force during transfers is never unwarranted or disproportionate. The Committee urges the State party to speed up proceedings with regard to the death of Joseph Ndukaku Chiakwa.

Administrative detention of undocumented migrants

17. While noting that minors account for only 2 per cent of cases of administrative detention of migrants, the Committee remains concerned that the maximum period of administrative detention for children aged 15-18 is still 12 months. The Committee

also notes with concern reports to the effect that undocumented migrants, in particular when subject to a Dublin decision, are systematically placed in detention in some cantons. With regard to conditions of detention, the Committee welcomes the fact that new, purpose-built facilities are planned but notes that, until now, some migrants in administrative detention have been accommodated in pretrial detention facilities where they are subject de facto to the same prison regime as persons awaiting trial (arts. 11 and 16).

The State party should develop and implement alternatives to administrative detention and should use detention only as a last resort, particularly where unaccompanied minors are concerned, and, when detention is necessary and proportionate, for as short a period as possible. The State should continue its efforts to provide special facilities in all cantons in order to accommodate migrants in administrative detention under an appropriate regime.

Unaccompanied asylum-seeking minors

18. The Committee shares the concerns of the Committee on the Rights of the Child regarding reception conditions for asylum-seeking minors, who are sometimes accommodated in military bunkers (see CRC/C/CHE/CO/2-4, para. 69 (f)). The Committee is also concerned at the fact that there are no persons of confidence or legal advisers present at hearings for unaccompanied minors during the asylum procedure. Lastly, the Committee notes with concern that 44 asylum procedures for unaccompanied minors were discontinued in 2014 because the minors disappeared from their reception centres (arts. 3, 12 and 16).

The Committee invites the State party to:

(a) Ensure that reception conditions for asylum-seeking minors are appropriate to their status as minors;

(b) Honour its commitment to ensure that persons of confidence and legal advisers are present at all hearings for unaccompanied minors;

(c) Make thorough inquiries into the disappearance of unaccompanied minors staying at reception centres, identify them and launch a search for them, as they could have become victims of trafficking.

Prison conditions

19. The Committee is concerned about overcrowding at Champ-Dollon prison, which prompted the Federal Tribunal to confirm in 2014 that detention conditions in that prison could amount to degrading treatment. The Committee also notes with concern that ethnic tensions between prisoners in the prison led to three days of clashes in February 2014 that left 26 prisoners and 8 wardens injured. As to pretrial detention, the Committee notes the State party's undertaking to apply a less restrictive prison regime to those awaiting trial. However, it remains concerned that strict separation between women and men is not yet guaranteed at Champ-Dollon, and that the same applies to the separation between minors and adults in most regional prisons, where children are not adequately catered for. As to prisoners' access to health care, while the Committee takes note of the forthcoming Swiss Prison Health Board report, it urges the State party to resolve the issue of unequal access to health care in the different cantons, particularly in respect of persons with mental disorders. In this respect, the Committee agrees with the conclusions of the National Commission for the Prevention of Torture regarding solitary confinement for persons with mental disabilities, with no possibility of therapy, in high security facilities. Lastly, the Committee notes with concern that, according to an evaluation by the Federal Tribunal

in July 2014, the physical conditions of police detention in the canton of Vaud amount to degrading treatment given the unreasonable length of detention (arts. 11 and 16).

The Committee recommends that the State party pursue its efforts to improve prison conditions as a matter of urgency, in accordance with the recommendations of the National Commission for the Prevention of Torture, and, in particular, that it:

(a) Be more persistent in its attempts to reduce prison overcrowding at Champ-Dollon, in particular by increasing the use of alternatives to custodial sentences, such as community service, in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules);

(b) Honour its commitment to modify the regime for pretrial detainees to reflect their status as unconvicted persons;

(c) Take the necessary steps to guarantee strict separation and appropriate treatment for adults and minors, and for men and women;

(d) Improve the physical conditions of detention in police stations in the canton of Vaud and ensure the strict application of the maximum duration of police custody;

(e) Make thorough and impartial inquiries into all acts of violence committed in prison facilities and continue its efforts at prevention of violence in Champ-Dollon;

(f) Ensure that solitary confinement in high security facilities is never applied to persons with a psychosocial disability;

(g) Ensure that therapeutic treatment in appropriate facilities is guaranteed in all cantons.

Intersex persons

20. The Committee welcomes the Federal Council decision to give an opinion by the end of 2015 on the recommendations of the National Advisory Commission on Biomedical Ethics with regard to the unnecessary and in some cases irreversible surgical procedures that have been carried out on intersex persons (i.e. persons with variations in sexual anatomy) without the effective, informed consent of those concerned. However, the Committee notes with concern that these procedures, which reportedly caused physical and psychological suffering, have not as yet given rise to any inquiry, sanction or reparation (arts. 2, 12, 14 and 16).

The Committee recommends that, in light of the forthcoming decision by the Federal Council, the State party:

(a) Take the necessary legislative, administrative and other measures to guarantee respect for the physical integrity and autonomy of intersex persons and to ensure that no one is subjected during infancy or childhood to non-urgent medical or surgical procedures intended to decide the sex of the child, as recommended by the National Advisory Commission on Biomedical Ethics and the Committee on the Rights of the Child (see CRC/C/CHE/CO/2-4, para. 43 (b));

(b) Guarantee counselling services and free psychosocial support for all persons concerned and their parents, and inform them that any decision on unnecessary treatment can be put off until the person concerned are able to decide for themselves;

(c) Undertake investigation of reports of surgical and other medical treatment of intersex people without effective consent and adopt legal provisions in order to provide redress to the victims of such treatment, including adequate compensation.

Training

21. While noting the information provided on the training programmes for police and prison staff, the Committee finds it regrettable that it received only limited information about the training provided to other public officials in contact with persons deprived of their liberty. It also notes with concern that the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) is not covered in this training. Lastly, the Committee is concerned that no specific methodologies exist to evaluate the effectiveness of training programmes for police and prison staff on the absolute prohibition of torture and ill-treatment (art. 10).

The State party should strengthen its efforts to provide training for all officials concerned on its obligations under the Convention, as well as systematic training and practice in applying the Istanbul Protocol. It should also develop specific methodologies to evaluate the training programmes provided on the absolute prohibition of torture and ill-treatment to police and prison staff.

Follow-up procedure

22. The Committee requests the State party to provide, by 14 August 2016, information on its follow-up to the Committee's recommendations as contained in paragraph 10, on police violence, particularly subparagraph (b), on the need to send medical reports of injuries indicating ill-treatment to the independent mechanism responsible for examining them; paragraph 13, on the principle of non-refoulement; paragraph 18, on unaccompanied asylum-seeking minors; and paragraph 19, on prison conditions, particularly subparagraph (e), on the need to make inquiries into all acts of violence committed in prison facilities.

Other issues

23. The Committee invites the State party to consider expediting the process of ratifying the core United Nations human rights treaties to which it is not yet a party, namely the:

(a) International Convention for the Protection of All Persons from Enforced Disappearance;

(b) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

(c) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;

(d) Optional Protocol to the International Covenant on Civil and Political Rights;

(e) Optional Protocol to the Convention on the Rights of the Child on a communications procedure;

(f) Optional Protocol to the Convention on the Rights of Persons with Disabilities.

24. The State party is requested to disseminate widely the report submitted to the Committee and the Committee's concluding observations, in the appropriate languages, through official websites, the media and non-governmental organizations.

25. The Committee invites the State party to submit its eighth periodic report by 14 August 2019. For that purpose, the Committee will, in due course, transmit to the State party a list of issues prior to reporting, considering that the State party has agreed to report to the Committee under the optional reporting procedure.